American Financial Services Association

November 20, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

**Re: Regulation Z; Docket No. R-1370**

Dear Ms. Johnson:

The American Financial Services Association ("AFSA")[1] appreciates the opportunity to comment on the proposed amendments to Regulation Z ("Proposed Rule"), which implements the Truth in Lending Act ("TILA"). AFSA understands that these amendments implement the provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act) that are effective on February 22, 2010.

**EFFECTIVE DATE**

While many provisions of the Credit Card Act, as implemented by the Federal Reserve Board's ("Board") Proposed Rule, are closely related to provisions of the Board's January 2009 Regulation Z Rule, AFSA strongly urges the Board to keep the effective date of the January 2009 Regulation Z Rule as July 1, 2010. Though we realize these issues are politically sensitive, we remind the Board that the changes we are implementing are massive from a systems / operations perspective. Given the scope of all these changes and the scale of the process and systems changes they require, moving the implementation date up to February 22, 2010 would make compliance problematic and unduly burdensome.

These amendments are the most radical changes that have ever been made to the open-end, non-secured provisions of Regulation Z, and AFSA member companies are working hard to comply with all of the new regulations. However, it may be impossible for some companies to make all the system changes that the amendments demand, and print all the necessary documents in time to comply with the rules that become effective on February 22, even if the implementation date of the January 2009 Regulation Z Rule is not changed. Even if member companies can make the systems changes by the effective date, printing all of the new disclosures will take a considerable amount of time.

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit. AFSA member companies offer or are assigned many types of credit products, including credit cards, retail credit, automobile retail installment contracts, and mortgage loans.

**SECTION 226.51(A) GENERAL ABILITY TO PAY**

AFSA believes that the "ability to pay" standard in section 109 of the Credit Card Act and in the Board's Proposed Rule is detrimental to free market notions and consumer choice. Applying an analysis that is based upon one particular model, which does not take into consideration other factors inherent or unique to specific lending types, has no bright line test, and is susceptible to subjective review and litigation, will only serve to drive those products it is being applied to out of the market. Any requirements that go beyond the notion that a creditor's success is determined by its ability to make a reasonable determination to lend money to a consumer who has a reasonable ability to pay, and survive in the market place, will only strangle credit availability. Implementing the ability to pay standard in the manner proposed by the Board will significantly raise the cost of making credit available, which will eliminate products and consumer choice from the market.

AFSA understands that the Board must implement the ability to pay standard expressed in the Credit Card Act. However, AFSA asks that the Board withdraw its requirement that creditors review the consumer's income or assets as well as the consumer's current obligations in meeting the ability to pay standard. To determine ability to pay, creditors should only need to show that they use a valid, predictive credit scoring model. Creditors should not need to include a detailed evaluation of a consumer's income, assets and other current obligations.

The Board's requirement that creditors consider the ability of the consumer to make the required minimum periodic payments based on the consumer's income or assets and the consumer's current obligations will create a number of issues for industry and consumers with little to no benefit for consumers. If adopted as proposed, the ability to pay standard will restrict credit available to consumers who would otherwise use that credit to purchase products sold by thousands of merchants. Now is not the time to restrict credit. Further restriction in the credit market could stop the slow climb out of the recession.

Credit scores have been used as proxies for determining ability to pay. The benefit of using these tools for determining ability to pay is that they are supported by historical information and accuracy and dispute requirements that make them more reliable than consumer statements on applications. Such scores can be more predictive of future behavior (character) than simply a narrow analysis of current income, assets and employment (capacity narrowly defined). A consumer's income, though, has been shown to be a poor indicator of ability to pay. In addition to credit scores, many credit bureaus offer income estimators which creditors should be allowed to rely on in determining an applicant's ability to pay.

The Proposed Rule does not make a complete exception for pre-existing relationships, often a very good predictor of ability to pay.[2] A creditor should be able to rely on payment behavior of an existing customer rather than income/asset information. For financial services companies with pre-existing customer relationships, general knowledge of a consumer's income or assets is sometimes used to identify offerees or qualify prospects for certain cards (*e.g.*, existing mortgage

[2] The Proposed Rule does allow creditors to consider a consumer's deposit history as a way to determine ability to pay, However, some AFSA members do not take deposits, but still have pre-existing relationships.

loan, home equity loan or auto loan relationships; other card relationships; depositor status [passbook, certificate of deposit, secured card, etc.]; or status as a business owner having a commercial loan with the bank, etc.). The Proposed Rule also does not take the finance companies knowledge of the consumer's collateral, such as secured cards for subprime borrowers or home equity for large lines of credit, into account.

The Board does include a safe harbor – the creditor can assume utilization of the full credit line that the creditor is considering offering to the consumer from the first day of the billing cycle. That safe harbor is too broad, as the majority of consumers only use about 20% of their credit line. Instead, creditors should be allowed to use a minimum required payment based on average credit line utilization by consumers of that credit card product. This will more realistically predict whether the consumer will have the financial capacity to make the likely minimum required payment and would avoid an undue restriction of available consumer credit.

The Board reportedly has indicated informally that reliance on aggregated data is not permitted, and that only individual data may be considered. AFSA believes that creditors should also be allowed to consider the ability to pay at the account level, as opposed to having to review the income and obligations of each specific consumer on the account.

The Proposed Rule raises a number of operational concerns. First, the general discussion suggests that a creditor would be permitted to rely on information provided by the consumer, but neither the rule nor the commentary suggests how a consumer's obligations should be considered. (For example, what if a consumer's "obligations" were not reflected in a credit report? Would the creditor still be held accountable for uncovering those obligations not in the credit report?) Thus, it is unclear if creditors must request minimum payment information on all obligations to meet the "reasonable policies and procedures" requirements.

Second, the Proposed Rule raises a number of issues for point of sale extensions of credit. New policies and procedures will be required. Such policies and procedures may require clerks to obtain more information from consumers, require consumers to provide information that they may not have readily available to them at the point of sale, and result in a longer wait-period at checkout (time to input additional consumer-specific information, evaluate the information, verify and make a credit decision, etc.). Credit granting may need to be separated from point of sale, which raises additional concerns and would negatively affect retailers with credit programs. The general discussion in the Proposed Rule suggests that a creditor would be permitted to rely on information provided by the consumer, but this is not explicit in the rule or commentary. Another side issue is privacy concerns. Consumers may be discouraged from applying for credit at point of sale because of privacy concerns regarding oral or written disclosure of personal information in a public setting.

Third, consumer credit card account balances may in some instances be guaranteed by third parties, such as merchants submitting transactions on the account for the financing of a sale of goods or services by the merchant. In those cases, the creditor should be able to include the income, assets and current obligations of the guarantor in the means to pay determination.

## SECTION 226.51(B) RULES AFFECTING YOUNG CONSUMERS

As in section 226.51(a), the Board appears to place tighter restrictions through its Proposed Rule than required under the Credit Card Act. The Credit Card Act states that a consumer under the age of 21 have on the application, "the signature of a cosigner, including the parent, legal guardian, spouse, or any other individual who has attained the age of 21 having a means to repay debts incurred by the consumer in connection with the account, indicating joint liability for debts incurred by the consumer in connection with the account before the consumer has attained the age of 21."[3] AFSA believes that this can be interpreted to mean that the parents, legal guardians or spouses can co-sign the application whether or not they are over the age of 21 or have the means to repay the debt. The Board, however, makes no distinction between a parent, a guardian or spouse, and other parties. The Board interprets that statute as requiring that either the applicant have independent means to repay the obligation or that a consumer 21 years or older with the means to repay the obligation and will also be liable on the account. This narrower approach may make it more difficult for applicant under the age of 21 to open an account. AFSA suggests that the Board use language in the final rule that more closely mirrors the language in the Credit Card Act.

## SECTION 226.2 DEFINITIONS AND RULES OF CONSTRUCTION

AFSA supports the Board's decision to exclude debit cards that access overdraft lines of credit from the proposed rule. AFSA agrees that Regulation E is the appropriate vehicle to regulate overdraft lines of credit and that creditors generally do not engage in the overdraft practices that the Credit Card Act addresses.

However, AFSA requests that the Board expand the exclusion to include lines of credit accessed by debit cards at ATMs. Debit cards are distinct from credit card products and only allow linkage or access at ATMs to existing lines of credit as a convenient service for consumers. They are not traditional credit card products and the Credit Card Act does not apply to them.

## SECTION 226.7(B)(12)(IV) PROVISION OF INFORMATION ABOUT CREDIT COUNSELING SERVICES

The Proposed Rule mandates that creditors provide a toll-free number on the periodic statement from which consumers can obtain information about credit counseling and debt management services. However, nonprofit credit counseling agencies come and go, as do their approvals by the U.S. Trustee's Office, and creditors should not have to bear the burden and expense of monitoring the continued existence of an agency and its status with the U.S. Trustee.

AFSA believes that consumers will receive more current and accurate information if periodic statements provide consumers with a toll-free number to access approved nonprofit credit counseling agencies in their zip codes, and the address for the U.S. Trustee's website, http://www.justice.gov/ust/eo/bapcpa/ccde/index.htm, which identifies approved credit

[3] "A Bill to amend the Truth in Lending Act to establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan, and for other purposes (Brief title: Credit Card Accountability Responsibility and Disclosure Act of 2009)." PL 111-24, 22 May 2009. Page 123 STAT. 1747.

counseling and debtor education services. This will eliminate the risk that outdated information could be unintentionally provided on a periodic statement, it will greatly reduce the cost of providing it, and consumers will always have the most updated information available. Additionally, providing the U.S. Trustee's toll free number and web address will eliminate the need for creditors to select the options on a state by state basis and give consumers the maximum amount of information to make informed decisions.

**SECTION 226.7(B)(14) DEFERRED INTEREST OR SIMILAR TRANSACTIONS**

In the May 2009 Regulation Z Proposed Clarifications, the Board proposed adding a requirement that creditors "include on a consumer's periodic statement, for two billing cycles immediately preceding the date on which deferred interest or similar transactions must be paid in full in order to avoid the imposition of interest changes, a disclosure that the consumer must pay such transaction in full by that date in order to avoid being obligated for the accrued interest."[4]

Many consumer credit card programs include transactions in which no interest is assessed for an initial promotional period and no interest will ever be charged for the promotional period, regardless of whether the transaction balance is paid before or after the expiration of that promotional period. AFSA would like to confirm that the Proposed Rule exempts the true "no interest" transactions, in which no interest is ever charged, from the periodic statement disclosure requirement.

AFSA also believes it is reasonable that periodic statements <u>rendered before the end of a specified deferred interest period</u> be excepted from the requirements of proposed section 226.7 that they disclose: the Minimum Payment Warning; the minimum payment repayment estimate; the minimum payment total cost estimate and statements regarding their assumptions; the estimated monthly payment for repayment in 36 months; the total cost estimate for repayment in 36 months; and the savings estimate for repayment in 36 months.

These warnings simply do not apply during periods of deferred interest since the assumption is that the consumer will take advantage of the deferral of interest during the specified period, and for creditors to estimate those amounts during periods of deferred interest when consumers choices are unknown will be burdensomely complicated. However, AFSA agrees that those disclosures and warnings should be on periodic statements rendered after the specified periods of deferral.

**SECTION 226.10(A)-(C) PAYMENTS**

AFSA agrees with the Board that it is appropriate for the Proposed Rule to refer to the time zone of the location specified by the creditor for the receipt of payments, and not the time zone in which the consumer resides. AFSA appreciates that the Board understands that "a rule requiring a creditor to process payments differently based on the time zone at each consumer's billing address could impose significant operational burdens on creditors."[5]

[4] "Truth in Lending, Proposed Rule." Federal Register 74, No. 202 (21 October 2009): 54145.
[5] Ibid, 54155.

AFSA respectfully requests that the Board give additional clarification as to what constitutes receipt of payment. For example, many AFSA members hire a third-party processor to obtain credit card account mail payments from a United States Postal Service ("USPS") P.O. Box and to process the payments received in that box, or have lockbox arrangements with their own creditors. In those cases, does a payment count as being "received" by the creditor when: (1) USPS personnel put the consumer's mailed payment in the box; (2) the third party payment processor removes that consumer's mailed payment from the box; (3) the third-party payment processor processes the consumer's mailed payment; or (4) when the third-party payment processor transfers those funds to the creditor?

The Board should explicitly state that electronic payments are received by a creditor when the funds are deposited in the account of the creditor, as the processing cutoffs at the depository institution used by the consumer or the depository institution used by the creditor may cause the deposit of those funds in the account of the creditor to be delayed by one business day.

**SECTION 226.16 ADVERTISING**

In order to keep programs that are beneficial to consumers in place, the final rule should confirm that deferred interest transactions subject to the special disclosure requirements of section 226.16(h) do not include: (1) transactions in which no interest will ever be assessed, regardless of when the balance is paid, whether during or after the promotional period; and (2) transactions which accrue interest during the promotional period in which no payments are due and that interest will be due and payable at the end of the promotional period, regardless of when payments are made on the account.

**SECTION 226.52 LIMITATIONS ON FEES**

AFSA asks that the Board exclude from the definition of "fees" any fees related to consumer-initiated transactions. AFSA understands that the Board added this section to stop the practice commonly known as "fee harvesting," in which creditors charge large fees at account opening which may leave consumers with a very limited amount of usable credit. While AFSA agrees that additional regulation in this area is appropriate, the broad definition of the term "fee" should not include fees associated with consumer initiated transactions, such as cash advance fees and balance transfer fees. Because these fees are beyond the control of the creditor and the consumer has a choice as to whether to use the services that result in the fees, they should be excluded. Not only would a broad definition implicate accounts that would otherwise not be seen as "fee harvester" if not for the behavior of the cardholder, but would force creditors to maintain a burdensome tracking mechanism to ensure that a consumer's behavior did not cause them to reach the 25% threshold.

**SECTION 226.53 ALLOCATION OF PAYMENTS**

Section 226.53 of Regulation Z and the staff commentary reflect the requirement of section 104 of the Credit Card Act, which provides that the creditor shall apply amounts in excess of the minimum required payment first to the credit card balance with the highest rate of interest and then to the balance bearing the next highest rate of interest, and so on, until the payment is exhausted. However, an exception exists to this rule in that the entire amount paid by the consumer in excess of minimum payment amount is to be applied to a balance in which interest is deferred during the last two billing cycles immediately preceding the expiration of the period during which interest is deferred. Because true "no interest" promotions are not included in the definition of deferred interest, AFSA understands that "no interest" promotions are not included in this section. It would be very frustrating for consumers who pay above the minimum payment to have those payments allocated first to a no interest balances that does not accrue interest during the specified period, rather than to reduce interest-bearing balances.

The Proposed Rule also does not address "special terms" transactions. These are transactions in which interest accrues during the promotional no payments period, regardless of when that transaction is paid, with the entire amount of the transaction being due at the end of the promotional no payments period. The proposal also does not address the question of whether a creditor can change the payment application method at the request of a consumer.

AFSA suggests that the final rule specifically state that deferred interest transactions to which payments may have to be applied before interest-bearing balances do not include: (1) transactions in which no interest will ever be assessed, regardless of when the balance is paid, whether during or after the promotional period; and (2) transactions which accrue interest during the promotional period in which no payments are due and that interest will be due and payable at the end of the promotional period, regardless of when payments are made on the account. AFSA believes this change would greatly benefit consumers.

The final rule should also allow a creditor the discretion to change the payment application method on a consumer's credit card account at the request of the consumer. Most creditors currently give consumers the option to direct allocation of payments. Prohibiting this practice would create a huge customer service issue.

AFSA also requests that the Board issue specific guidance on how to allocate a payment among two or more "same as cash" transactions. It is unclear whether a creditor should allocate the payment to the earlier or later transaction, or apportion it among both.

*"AVOID OR MINIMIZE" CLARIFICATION*

AFSA seeks clarification of the "avoid or minimize" requirement. Specifically, we understand that a creditor should avoid allocating payment to balances that are disputed—however, when there is *only* disputed balances to allocate a payment to, our members have no other choice but to allocate payments to disputed balances. We would like verification that our interpretation is correct: that creditors should avoid allocating payments to disputed balances in general, but ***may*** allocate payments to balances in dispute where reasonable.

**SECTION 226.54 LIMITATIONS ON THE IMPOSITION OF FINANCE CHARGES**

AFSA strongly urges the Board to clarify that waiver of "trailing interest," which is interest that accrues on a balance during the billing cycle in which a revolving balance is paid in full, does not qualify as a "grace period," as defined by section 226.54. This policy of waiving the trailing interest is in the consumer's best interest and helps consumer avoid unexpected bills and fees after they believe their account was paid in full. If the Board does not exempt waiver of trailing interest from the definition of grace period, many creditors will be forced to stop offering this consumer-friendly policy, since extending such an interest waiver to any partial payment received in any billing cycle would be too expensive.

**SECTION 226.5(B)(1) TEMPORARY RATE EXCEPTION**

AFSA requests that the Board clarify that for promotions not given in connection with an account opening, creditors should not be required to give the specific "go to" interest rate at the point of sale. First, it would be operationally difficult to disclose the specific "go to" rate to the consumer when the consumer is making a purchase because a consumer's specific rate would not be known by any system at the point of sale. Second, this additional disclosure is unnecessary because the specific rate is disclosed to new customers when the account is opened and to existing customers on the monthly billing statement. We suggest flexibility in allowing creditors to provide a non-individualized "up to" interest rate as part of the promotional disclosure as a permanent solution, not just on a temporary transition basis, to remind the consumer of the highest rate that may apply to the purchase balance post-promotion. In addition, a specific comment should be added to expressly permit creditors to provide promotion information in advance (by statements or mail), using an "up to" rate. For online promotions, we request that promotional disclosures should not require consent to electronic communications. Instead, these disclosures should be treated like other advertising requirements under Regulation Z and not be required in writing.

**SECTION 226.55(B)(4) DELINQUENCY EXCEPTION**

AFSA respectfully requests that the final rule specifically state that, once an account goes past due, the creditor is permitted to send the 45 day notice of the penalty rate immediately, identifying the 60-day trigger date and statutory cure period if the current default is not promptly remedied. The creditor should not be required to wait until the account becomes 60 days past due before sending the notice, so that the rate could not be increased until after 45 additional days. Without this clarification, a consumer would otherwise have a total of at least 105 days after they failed to make the minimum monthly payment before the higher rate could be assessed. The assumption that the 45 and 60 day periods run concurrently and not consecutively is not explicitly stated in the Board proposal. Additionally, this early-anticipatory notice would allow the consumer to avoid becoming 60 days delinquent, which affects the consumer's credit rating. Congress has already determined that a 60-day trigger period and 6-month cure provide adequate consumer incentive and protection. A 105 day period, being out of sync with normal billing cycles, will either confuse consumers with a mid-cycle rate change or establish a de facto 120 day trigger period, twice the period that Congress deemed appropriate, which will place further upward pressure on non-penalty rates or cause further restriction in credit availability.

**SECTION 226.55(D)(2) CONTINUING APPLICATION OF SECTION 226.55**

The Proposed Rules require that if a consumer transferred a balance, but the creditor stayed the same, then the creditor would need to protect the existing account and would not be able to increase the annual percentage rates. While as a general rule creditors tell consumers they cannot transfer a balance to another balance they have with the creditor, operationally, the creditor may not always be able to prevent the consumer from doing this. Additionally, creditors may not know if it happened and so could not protect the transferred balance. We believe the requirement to protect existing balances should not apply when the balance is transferred (at a consumer's request), regardless of who the creditor is.

**SECTION 226.57 SPECIAL RULES FOR MARKETING OPEN-END CREDIT TO COLLEGE STUDENTS**

AFSA believes that the Board's broad definition of "near campus" as a location within 1,000 feet of the border of the campus will encompass many creditors who are trying to serve the general population and are not focused on serving college students. Because of the spread of satellite campuses, many of which are in a single inner city building, and the increasing number of urban campuses, particularly those of community colleges, there are a number of instances were a college building could be next door to a creditor's office. The Board should only prohibit retailers from sites on formal university campuses, and the regulation should have a grandfather clause for those business that were in place before the regulations take effect.

Section 226.57(c) also prohibits offering a tangible item to a college student in a solicitation or applications that is mailed to the student at an address on or near the campus. This provision is difficult to comply with as some student addresses do not include the name of the college in the address. It would accomplish the Board's goal of protecting college students if the prohibition was against "targeting" college students, as opposed to "offering" the students the item. When the creditor got an application in the mail as a result of the mailed solicitation, the creditor could be prohibited from accepting the application.

**SECTION 226.58 INTERNET POSTING OF CREDIT CARD AGREEMENTS**

AFSA asks that the Board clarify why the credit limit needs to be posted on the creditor's website and submitted to the Board. Credit lines are not part of a consumer's account agreement and therefore should not be included as a pricing element. Additionally, credit limits are generally available on consumer billing statements and therefore a consumer has ample opportunity to get this information.

Additionally, AFSA believes that requiring creditors to provide consumer's agreements within 10 business days does not give the creditor adequate time to respond to requests. AFSA believes that 60 days would be a more appropriate timeframe. A consumer agreement is very detailed and for older accounts that may have gone through numerous terms changes (both substantial with change in terms notices and non-substantive changes), trying to recreate the agreement takes time to prepare and mail. Alternatively, creditors should be permitted to provide the most current set of terms for all consumers upon any consumer request with a pricing addendum for that consumer's specific pricing for the terms listed in the account opening table. Additionally, there should be an exemption from this requirement for (1) accounts purchased by a creditor (and not opened by the creditor) as the purchased account assets do not always include the original account terms and thus it would be impossible for the current creditor to provide such terms and

(2) accounts existing on the books of creditors more than [3] years before the effective date of this requirement.

**CONCLUSION**

Again, AFSA thanks the Board for the opportunity to comment on the Proposed Rule.

Please do not hesitate to contact me at 202-296-5544 if we can provide further assistance on this or other rulemakings to implement the Act.

Sincerely yours,

Christopher Stinebert
President and CEO

## ADDITIONAL COMMENTS

SECTION 226.2(A)(20) OPEN-END CREDIT

AFSA realizes that the Board requested that commenters limit the scope of their comments to the proposed changes, which are discussed in the supplementary information. However, the changes to the official staff commentary on section 2(a)(20)(5) in January of 2009 describing the reusable line requirement of the definition of open-end credit create an unworkable and undefined compliance requirement for consumer credit card lenders and AFSA believes that the Board should be aware of the difficulty that the changes pose.

The commentary states, "The creditor may occasionally or routinely verify credit information such as the consumer's continued income and employment status or information for security purposes but, to meet the definition of open-end credit, such verification of credit information may not be done as a condition of granting a consumer's request for a particular advance under the plan." One of the many issues that this restrictive requirement creates is in determining what activities can or cannot be performed when a purchase transaction is submitted on a consumer credit card without triggering closed-end installment requirements.

Specifically, AFSA would like the Board to provide guidance on which of the following factors a creditor can consider when a consumer submits a charge on an open-end credit card account without triggering a closed-end disclosure requirement. Can a creditor consider the following when verifying credit information for a consumer for an extension of open-end credit:

1. Account restrictions, such as reports of fraudulent use or a customer-initiated lock on the account;
2. Account history, including: (i) prior or current past due or default status; (ii) payments in excess of the minimum requirement amounts; and (iii) comparing prior purchase types, merchant locations and amounts to current activity;
3. Charge(s) that would exceed the current credit limit, and treating that as a consumer request for credit review;
4. Specific consumer requests for credit review;
5. Past due or default status of other open-end, deposit or closed-end accounts of the consumer with the creditor or an affiliate of the creditor; or
6. Credit bureau information and reports on the consumer which may demonstrate evidence of fraud, decline in creditworthiness or derogatory information?

The difficult issues created by the changes to the official staff commentary on this issue show that it creates an unworkable and undefined compliance requirement for credit card lenders. If open-end credit is being abused by a few creditors, those abuses should be addressed by enforcement of existing state and federal deceptive trade practices law and not by imposing undefined and unworkable TILA requirements on all consumer credit card lenders.